Judicial Council of California Criminal Jury Instructions

CALCRIM

Supplement With New and Revised Instructions

As approved at the
December 9, 2008, Judicial Council Meeting

Judicial Council of California
Advisory Committee on Criminal Jury Instructions

Hon. Sandra Lynn Margulies, Chair

LexisNexis Matthew Bender
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Editorial Offices
744 Broad Street, Newark, NJ 07102 (973) 820-2000
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

(Pub. 1284)

Table of New and Revised Judicial Council of California Criminal Jury Instructions (CALCRIM)

December 2008

This supplement to the 2008 edition of CALCRIM includes all new and revised Judicial Council of California Criminal Jury Instructions (CALCRIM) effective December 9, 2008.

Volume 1

Table of Related Instructions for New CALCRIM (December 9, 2008)

CALCRIM No.		CALJIC No.
3456	. . . . .	None
3457	. . . . .	None
3458	. . . . .	None

(Pub. 1284)

100. Trial Process (Before or After Voir Dire)

[Jury service is very important and I would like to welcome you and thank you for your service.] Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. When I refer to "the People," I mean the attorney[s] from the (district attorney's office/city attorney's office/office of the attorney general) who (is/are) trying this case on behalf of the People of the State of California. When I refer to defense counsel, I mean the attorney[s] who (is/are) representing the defendant[s], _____ <*insert name[s] of defendant[s]*>.

[The first step in this trial is jury selection.

During jury selection, the attorneys and I will ask you questions. These questions are not meant to embarrass you, but rather to determine whether you would be suitable to sit as a juror in this case.]

The trial will (then/now) proceed as follows: The People may present an opening statement. The defense is not required to present an opening statement, but if it chooses to do so, it may give it either after the People's opening statement or at the beginning of the defense case. The purpose of an opening statement is to give you an overview of what the attorneys expect the evidence will show.

Next, the People will offer their evidence. Evidence usually includes witness testimony and exhibits. After the People present their evidence, the defense may also present evidence but is not required to do so. Because (he/she/they) (is/are) presumed innocent, the defendant[s] (does/do) not have to prove that (he/she/they) (is/are) not guilty.

After you have heard all the evidence and [before] the attorneys (give/have given) their final arguments, I will instruct you on the law that applies to the case.

After you have heard the arguments and instructions, you will go to the jury room to deliberate.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give an instruction outlining how the trial will proceed. This instruction has been provided for the convenience of the trial judge who may wish to explain the trial process to jurors. See California Rules of Court, Rule 2.1035.

The court may give the optional bracketed language if using this instruction before jury selection begins.

AUTHORITY

- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1179–1181 [67 Cal.Rptr.3d 871].

101. Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)

I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, or on the Internet. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations.

As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]. During the trial, do not read, listen to, or watch any news report or commentary about the case from any source.

Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not investigate the facts or law. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

[If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.]

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

When the trial has ended and you have been released as jurors,

you may discuss the case with anyone. But under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.

If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any juror, you must immediately tell the bailiff.

Some words or phrases that may be used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in the instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in the instructions are to be applied using their ordinary, everyday meanings.

Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

You must reach your verdict without any consideration of punishment.

New January 2006; Revised June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.) See also California Rules of Court Rule 2.1035.

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196 Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

If there will be a jury view, give the bracketed phrase "unless I tell you otherwise" in the fourth paragraph. (Pen. Code, § 1119.)

AUTHORITY

- Statutory Admonitions. Pen. Code, § 1122.
- Avoid Discussing the Case. *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports. *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 81, *Jury Selection and Opening Statement*, § 81.06[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[1], [4] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court's admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not

> to speak to anyone about the case except a fellow juror during deliberations . . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the second paragraph of this instruction.

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. I do not mean to discourage you from taking notes, but here are some points to consider if you take notes:

1. **Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;**

AND

2. **The notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.**

At the end of the trial, your notes will be (collected and destroyed/ collected and retained by the court but not as a part of the case record/_____ <*specify other disposition*>**).**

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031.

The court may specify its preferred disposition of the notes after trial. No statute or rule of court requires any particular disposition.

AUTHORITY

- Resolving Jurors' Questions. Pen. Code, § 1137.
- Jurors' Use of Notes. California Rules of Court, Rule 2.1031
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183 [67 Cal.Rptr.3d 871].

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 18.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85,

Submission to Jury and Verdict, § 85.05[2] (Matthew Bender).

104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that the defendant was arrested, charged with a crime, or brought to trial is not evidence of guilt.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses.

The court reporter is making a record of everything said during the trial. If you decide that it is necessary, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate.

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *People v. Barajas*

(1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

AUTHORITY

- Evidence Defined. Evid. Code, § 140.
- Arguments Not Evidence. *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence. *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2].
- Striking Testimony. *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183 [67 Cal.Rptr.3d 871].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence,* §§ 83.01[1], 83.02[2] (Matthew Bender).

200. Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.] [The instructions that you receive may be printed, typed, or written by hand. Certain sections may have been crossed-out or added. Disregard any deleted sections and do not try to guess what they might have been. Only consider the final version of the instructions in your deliberations.]

You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status (,/,) [or _____ <*insert any other impermissible basis for bias as appropriate*>.]

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about

the facts.] After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

New January 2006; Revised June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when they deliberate. (Pen. Code, §§ 1093(f), 1137.) Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

In the first paragraph, select the appropriate bracketed alternative on written instructions. Penal Code section 1093(f) requires the court to give the jury a written copy of the instructions on request. The committee believes that the better practice is to always provide the jury with written instructions. If the court, in the absence of a jury request, elects not to provide jurors with written instructions, the court must modify the first paragraph to inform the jurors that they may request a written copy of the instructions.

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196 Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

Do not give the bracketed sentence in the final paragraph if the court will be commenting on the evidence pursuant to Penal Code section 1127.

AUTHORITY

- Copies of Instructions. Pen. Code, §§ 1093(f), 1137.
- Judge Determines Law. Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts. Pen. Code, § 1127.
- Attorney's Comments Are Not Evidence. *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].
- Consider All Instructions Together. *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237

Cal.App.2d 606, 623 [47 Cal.Rptr. 96].

- Follow Applicable Instructions. *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice. Pen. Code, § 1127h; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 643, 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.05[1], Ch. 83, *Evidence*, § 83.02, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1], [2][c], 85.03[1], 85.05[2], [4] (Matthew Bender).

RELATED ISSUES

Jury Misconduct

It is error to instruct the jury to immediately advise the court if a juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis. (*People v. Engelman* (2002) 28 Cal.4th 436, 449 [121 Cal.Rptr.2d 862, 49 P.3d 209].)

220. Reasonable Doubt

The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].)

If the court will be instructing that the prosecution has a different burden of proof, give the bracketed phrase "unless I specifically tell you otherwise."

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127

L.Ed.2d 583]; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999.

- This Instruction Upheld. *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088–1089 [78 Cal.Rptr.3d 186].
- This Instruction Does Not Suggest That Bias Against Defendant Is Permissible. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185–1186 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 521, 637, 640.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], [2][a][i], 85.04[2][a] (Matthew Bender).

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 63 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language. For an alternate view of instructing on reasonable doubt, see Committee on Standard Jury Instructions—Criminal, Minority Report to CALJIC "Reasonable Doubt" Report, in Alternative Definitions of Reasonable Doubt: A Report to the California Legislature (May 22, 1987; repr., San Francisco: Daily Journal, 1987) pp. 51–53.

RELATED ISSUES

Pinpoint Instruction on Reasonable Doubt

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense's theory of the case and relates it to the state's burden of proof. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711, 465 P.2d 847] [error to deny requested instruction relating defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the

specific evidence on which the theory of the defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [185 Cal.Rptr. 506] [court erred in refusing to give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490, 496 [319 P.2d 346] [error to refuse instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–678 [199 Cal.Rptr. 680] [error to refuse instruction relating reasonable doubt to identification].)

223. Direct and Circumstantial Evidence: Defined

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction explaining direct and circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].) The court must give this instruction if the court will be giving either CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence* or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*.

The court, at its discretion, may give this instruction in any case in which circumstantial evidence has been presented.

AUTHORITY

- Direct Evidence Defined. Evid. Code, § 410.
- Logical and Reasonable Inference Defined. Evid. Code, § 600(b).
- Difference Between Direct and Circumstantial Evidence. *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 3.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

224. Circumstantial Evidence: Sufficiency of Evidence

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].)

There is no sua sponte duty to give this instruction when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Malbrough* (1961) 55 Cal.2d 249, 250–251 [10 Cal.Rptr. 632, 359 P.2d 30]; *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–1271 [46 Cal.Rptr.2d 388].) This is so even when the corroborative circumstantial evidence is essential to the prosecution's case, e.g., when corroboration of an accomplice's testimony is required under Penal Code section 1111. (*People v. Williams* (1984) 162 Cal.App.3d 869, 874 [208 Cal.Rptr. 790].)

If intent is the only element proved by circumstantial evidence, do not give this instruction. Give CALCRIM No. 225, *Circumstantial Evidence: Intent or*

Mental State. (*People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280].)

AUTHORITY

- Direct Evidence Defined. Evid. Code, § 410.
- Inference Defined. Evid. Code, § 600(b).
- Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence. *People v. Merkouris* (1956) 46 Cal.2d 540, 560–562 [297 P.2d 999] [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [328 P.2d 809] [sua sponte duty to instruct]; see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645].
- Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion. *People v. Bender* (1945) 27 Cal.2d 164, 175 [163 P.2d 8] [sua sponte duty to instruct]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [same].
- Difference Between Direct and Circumstantial Evidence. *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].
- Each Fact in Chain of Circumstantial Evidence Must Be Proved. *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243] [error to refuse requested instruction on this point].
- Sua Sponte Duty When Prosecutor's Case Rests Substantially on Circumstantial Evidence. *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186–1187 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 3.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 652.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (Matthew Bender).

RELATED ISSUES

Extrajudicial Admissions

Extrajudicial admissions are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175 [133 Cal.Rptr. 135, 554 P.2d 881].)

226. Witnesses

You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**
- **What was the witness's attitude about the case or about testifying?**
- **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**
- **How reasonable is the testimony when you consider all the other evidence in the case?**
- **[Did other evidence prove or disprove any fact about which the witness testified?]**
- **[Did the witness admit to being untruthful?]**
- **[What is the witness's character for truthfulness?]**
- **[Has the witness been convicted of a felony?]**

- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**
- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]

[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]

[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

The court may strike any of the enumerated impermissible bases for bias that are clearly inapplicable in a given case.

Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

If the court instructs on a prior felony conviction or prior misconduct admitted pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418, 841 P.2d 938], the court should consider whether to give CALCRIM No. 316, *Additional Instructions on Witness Credibility—Other Conduct*. (See Bench Notes to that instruction.)

AUTHORITY

- Factors. Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Inconsistencies. *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies. *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].
- Proof of Character by Negative Evidence. *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187–1188 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 642.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][b], [2][b], [c], 85.03[2][b] (Matthew Bender).

250. Union of Act and Intent: General Intent

The crime[s] [or other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent.

For you to find a person guilty of the crime[s] (in this case/ of _____ *<insert name[s] of alleged offense[s] and count[s], e.g., battery, as charged in Count 1>* **[or to find the allegation[s] of** _____ *<insert name[s] of enhancement[s]>* **true]), that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation].**

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) However, this instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses require only a general criminal intent by inserting the names of the offenses and count numbers where indicated in the second paragraph of the instruction. (*People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If all the charged crimes and allegations involve general intent, the court need not provide a list in the blank provided in this instruction.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required

for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt, supra*, 222 Cal.App.2d at pp. 586–587.)

If the defendant is also charged with a criminal negligence or strict liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua sponte** duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–5.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [2] (Matthew Bender).

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rtpr.3d 260]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In such cases, the court should give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, instead of this instruction.

252. Union of Act and Intent: General and Specific Intent Together

The crime[s] [(and/or) other allegation[s]] charged in Count[s] _____ require[s] proof of the union, or joint operation, of act and wrongful intent.

The following crime[s] [and allegation[s]] require[s] general criminal intent: _____ *<insert name[s] of alleged offense[s] and enhancement[s] and count[s], e.g., battery, as charged in Count 1>***. For you to find a person guilty of (this/these) crime[s] [or to find the allegation[s] true], that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose, however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation].**

The following crime[s] [and allegation[s]] require[s] a specific intent or mental state: _____ *<insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1>* **_____** *<insert name[s] of enhancement[s]>***]. For you to find a person guilty of (this/these) crimes [or to find the allegation[s] true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation].**

<Repeat next paragraph as needed>

[The specific (intent/ [and/or] mental state) required for the crime of _____ *<insert name[s] of alleged offense[s] e.g., burglary>* **is _____** *<insert specific intent>*.**]**

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385,

926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

Do not give this instruction if the case involves only offenses requiring a specific intent or mental state or involves only offenses that do not. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.)

The court should specify for the jury which offenses require general criminal intent and which require a specific intent or mental state by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

If the defendant is also charged with a criminal negligence or strict-liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, U*nion of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117

[60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].

- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed.2d 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189–1190 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1]–[3] (Matthew Bender).

RELATED ISSUES

See the Bench Notes and Related Issues sections of CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

300. All Available Evidence

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

New January 2006

BENCH NOTES

Instructional Duty

The court is not required to give this instruction sua sponte; however, it should be given on request. (See generally Pen. Code, §§ 1093(f), 1127; *People v. Pitts* (1990) 223 Cal.App.3d 606, 880, 881 [273 Cal.Rptr. 757].)

AUTHORITY

- Instructional Requirements. *People v. Simms* (1970) 10 Cal.App.3d 299, 313 [89 Cal.Rptr. 1].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189–1190 [67 Cal.Rptr.3d 871].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, Ch. 83, *Evidence* (Matthew Bender).

RELATED ISSUES

Willful Suppression of or Failure to Obtain Evidence

Willful suppression of evidence by the government constitutes a denial of a fair trial and of due process. (*People v. Noisey* (1968) 265 Cal.App.2d 543, 549–550 [71 Cal.Rptr. 339].) Likewise, willful failure by investigating officers to obtain evidence that would clear a defendant would amount to a denial of due process of law. (*Ibid.*) However, failure to look for evidence is different from suppressing known evidence and "the mere fact that investigating officers did not pursue every possible means of investigation of crime does not, standing alone, constitute denial of due process or suppression of evidence." (*Ibid.*; see also *People v. Tuthill* (1947) 31 Cal.2d 92, 97–98 [187 P.2d 16], overruled on other grounds as noted by *People v. Balderas* (1985) 41 Cal.3d 144, 182 [222 Cal.Rptr. 184, 711 P.2d 480] ["[t]here is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court

the material evidence bearing upon the charge for which the defendant is on trial."].)

302. Evaluating Conflicting Evidence

If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on weighing contradictory evidence unless corroborating evidence is required. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].)

AUTHORITY

- Instructional Requirements. *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884 [123 Cal.Rptr. 119, 538 P.2d 247].
- This Instruction is Upheld. *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1497 [60 Cal.Rptr.3d 777]; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 649.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

316. Additional Instructions on Witness Credibility—Other Conduct

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<Alternative A—felony conviction>

[If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

<Alternative B—prior criminal conduct with or without conviction>

[If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

New January 2006

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction; however, the instruction must be given on request. (*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [260 Cal.Rptr. 27]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080] [overruling *People v. Mayfield* (1972) 23 Cal.App.3d 236 [100 Cal.Rptr. 104], which had found a sua sponte duty to give limiting instruction on felony conviction admitted for impeachment].)

If a felony conviction or other misconduct has been admitted only on the issue of credibility, give the bracketed word "only."

Do not give this instruction if a conviction also has been admitted to prove an element of a charged offense. (*People v. Dewberry* (1959) 51 Cal.2d 548, 553–554 [334 P.2d 852].)

It is unclear whether this instruction is appropriate if the evidence also has been admitted for a purpose other than to prove an element of the offense (as

discussed above). For example, the evidence may have been admitted under Evidence Code section 1108. In such cases, if the court does give this instruction, the court may omit the bracketed "only."

AUTHORITY

- Limiting Instruction Must Be Given on Request. *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [260 Cal.Rptr. 27]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].
- Felony Conviction Admissible for Impeachment. Evid. Code, § 788.
- Standard for Admitting Felony Conviction. *People v. Castro* (1985) 38 Cal.3d 301, 306–319 [211 Cal.Rptr. 719, 696 P.2d 111]; *People v. Beagle* (1972) 6 Cal.3d 441, 451–452 [99 Cal.Rptr. 313, 492 P.2d 1].
- Misdemeanor Conduct Admissible for Impeachment. *People v. Wheeler* (1992) 4 Cal.4th 284, 295–296 [14 Cal.Rptr.2d 418, 841 P.2d 938].
- Record Must Demonstrate Court Conducted Evid. Code, § 352 Weighing. *People v. Navarez* (1985) 169 Cal.App.3d 936, 950 [215 Cal.Rptr. 519].
- Modifications to this Instruction Created Error. *People v. Gray* (2007) 158 Cal.App.4th 635, 640–641 [69 Cal.Rptr.3d 876].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 292–314.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][e], Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 105, *Executive Clemency*, § 105.04[3] (Matthew Bender).

355. Defendant's Right Not to Testify

A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

New January 2006

BENCH NOTES

Instructional Duty

This instruction should only be given on request. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *People v. Evans* (1998) 62 Cal.App.4th 186, 191 [72 Cal.Rptr.2d 543].)

The court has no sua sponte duty to seek a personal waiver of the instruction from the defendant. (*People v. Towey* (2001) 92 Cal.App.4th 880, 884 [112 Cal.Rptr.2d 326].)

The United States Supreme Court has held that the court may give this instruction over the defendant's objection (*Lakeside v. Oregon* (1978) 435 U.S. 333, 340–341 [98 S.Ct. 1091, 55 L.Ed.2d 319]), but as a matter of state judicial policy, the California Supreme Court has found otherwise. (*People v. Roberts* (1992) 2 Cal.4th 271, 314 [6 Cal.Rptr.2d 276, 826 P.2d 274] ["[T]he purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should accede to that request, notwithstanding the lack of a constitutional requirement to do so."].)

AUTHORITY

- Instructional Requirements. *People v. Lewis* (1990) 50 Cal.3d 262, 282 [266 Cal.Rptr. 834, 786 P.2d 892] [no sua sponte duty to instruct].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191–1192 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 642, 658.

2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 439.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.04[2][b] (Matthew Bender).

358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when there is evidence of an out-of-court oral statement by the defendant.

In addition, the court has a **sua sponte** duty to give the bracketed cautionary instruction when there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1].) An exception is that in the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the bracketed paragraph. If the jury heard

only exculpatory statements by the defendant, do not give the bracketed paragraph.

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases]; but see *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509] [no sua sponte duty to instruct with CALJIC 2.71 in criminal threat case because "truth" of substance of the threat was not relevant and instructing jury to view defendant's statement with caution could suggest that exercise of "caution" supplanted need for finding guilt beyond a reasonable doubt].)

Related Instructions

If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements. *People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1]; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 614, 641, 650.

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 51.

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 113.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.57 (Matthew Bender).

370. Motive

The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

New January 2006

BENCH NOTES

Instructional Duty

The court does not have a sua sponte duty to instruct on motive. (*People v. Romo* (1975) 14 Cal.3d 189, 196 [121 Cal.Rptr. 111, 534 P.2d 1015] [not error to refuse instruction on motive].)

Do not give this instruction if motive is an element of the crime charged. (See, e.g., CALCRIM No. 1122, *Annoying or Molesting a Child.*)

AUTHORITY

- Instructional Requirements. *People v. Romo* (1975) 14 Cal.3d 189, 195–196 [121 Cal.Rptr. 111, 534 P.2d 1015]; *People v. Young* (1970) 9 Cal.App.3d 106, 110 [87 Cal.Rptr. 767].
- Jury May Consider Motive. *People v. Brown* (1900) 130 Cal. 591, 594 [62 P. 1072]; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877–878 [198 P.2d 81].
- Proof of Presence or Absence of Motive Not Required. *People v. Daly* (1992) 8 Cal.App.4th 47, 59 [10 Cal.Rptr.2d 21]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017–1018 [80 Cal.Rptr.2d 676].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192–1193 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 4; Defenses, § 249.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 119.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

RELATED ISSUES

Entrapment Defense

The court should not instruct on motive if the defendant admits his guilt for the substantive crime and presents an entrapment defense, because in that instance his or her commission of the crime would not be an issue and motive would be irrelevant. (See *People v. Martinez* (1984) 157 Cal.App.3d 660, 669 [203 Cal.Rptr. 833]; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 [268 Cal.Rptr. 595].)

No Conflict With Other Instructions

Motive, intent, and malice are separate and distinct mental states. Giving a motive instruction does not conflict with intent and malice instructions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503–504 [117 Cal.Rptr.2d 45, 40 P.3d 754] [motive describes the reason a person chooses to commit a crime]; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098 [24 Cal.Rptr.2d 922].) Similarly, a motive instruction that focuses on guilt does not conflict with a special circumstance instruction, which the jury is directed to find true or not true. (*People v. Heishman* (1988) 45 Cal.3d 147, 178 [246 Cal.Rptr. 673, 753 P.2d 629] [defendant argued motive to prevent victim from testifying was at core of special circumstance].) A torture murder instruction that requires an intent to cause cruel pain or suffering for the purpose of revenge, extortion, or any sadistic purpose also does not conflict with the motive instruction. The torture murder instruction does not elevate motive to the status of an element of the crime. It simply makes explicit the treatment of motive as an element of proof in torture murder cases. (*People v. Lynn* (1984) 159 Cal.App.3d 715, 727–728 [206 Cal.Rptr. 181].)

376. Possession of Recently Stolen Property as Evidence of a Crime

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If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____ <*insert crime*> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____ <*insert crime*>.

The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of _____ <*insert crime*>.

[You may also consider whether _____ <*insert other appropriate factors for consideration*>.]

Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

New January 2006

BENCH NOTES

Instructional Duty

The instruction should be given **sua sponte** if there is evidence of possession of stolen property and corroborating evidence of guilt. (See *People v. Clark* (1953) 122 Cal.App.2d 342, 346 [265 P.2d 43] [failure to instruct that unexplained possession alone does not support finding of guilt was error]; *People v. Smith* (1950) 98 Cal.App.2d 723, 730 [221 P.2d 140].)

The instruction may be given when the charged crime is robbery, burglary, theft, or receiving stolen property. (See *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449] [burglary and theft]; *People v. Johnson* (1993) 6 Cal.4th 1, 36–37 [23 Cal.Rptr.2d 593, 859 P.2d 673] [burglary]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 453 [27 Cal.Rptr.2d 451] [robbery]; *People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258

Cal.Rptr. 482] [receiving stolen property].) The crime of receiving stolen property includes receiving property that was obtained by extortion (Pen. Code, § 496). Thus, the instruction also includes optional language for recently extorted property.

Use of this instruction should be limited to theft and theft-related crimes. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 [111 Cal.Rptr.2d 403] [disapproving use of instruction to infer guilt of murder]; but see *People v. Harden* (2003) 110 Cal.App.4th 848, 856 [2 Cal.Rptr.3d 105] [court did not err in giving modified instruction on possession of recently stolen property in relation to special circumstance of murder committed during robbery]; *People v. Smithey* (1999) 20 Cal.4th 936, 975–978 [86 Cal.Rptr.2d 243, 978 P.2d 1171] [in a case involving both premeditated and felony murder, no error in instructing on underlying crimes of robbery and burglary]; *People v. Mendoza* (2000) 24 Cal.4th 130, 176–177 [99 Cal.Rptr.2d 485, 6 P.3d 150].)

Corroborating Evidence

The bracketed paragraph that begins with "You may also consider" may be used if the court grants a request for instruction on specific examples of corroboration supported by the evidence. (See *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209] [list of examples]; see also *People v. Peters* (1982) 128 Cal.App.3d 75, 85–86 [180 Cal.Rptr. 76] [reference to false or contradictory statement improper when no such evidence was introduced]). Examples include the following:

a. False, contradictory, or inconsistent statements. (*People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258 Cal.Rptr. 482]; see, e.g., *People v. Peete* (1921) 54 Cal.App. 333, 345–346 [202 P. 51] [false statement showing consciousness of guilt]; *People v. Lang* (1989) 49 Cal.3d 991, 1024–1025 [264 Cal.Rptr. 386, 782 P.2d 627] [false explanation for possession of property]; *People v. Farrell* (1924) 67 Cal.App. 128, 133–134 [227 P. 210] [same].)

b. The attributes of possession, e.g., the time, place, and manner of possession that tend to show guilt. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 424; *People v. Hallman* (1973) 35 Cal.App.3d 638, 641 [110 Cal.Rptr. 891]; see, e.g., *People v. Gamble* (1994) 22 Cal.App.4th 446, 453–454 [27 Cal.Rptr.2d 451].)

c. The opportunity to commit the crime. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 425; *People v. Mosqueira* (1970) 12 Cal.App.3d 1173, 1176 [91 Cal.Rptr. 370].)

d. The defendant's conduct or statements tending to show guilt, or the failure to explain possession of the property under circumstances that

indicate a "consciousness of guilt." (*People v. Citrino* (1956) 46 Cal.2d 284, 288–289 [294 P.2d 32]; *People v. Wells* (1960) 187 Cal.App.2d 324, 328–329, 331–332 [9 Cal.Rptr. 384]; *People v. Mendoza* (2000) 24 Cal.4th 130, 175–176 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Champion* (1968) 265 Cal.App.2d 29, 32 [71 Cal.Rptr. 113].)

e. Flight after arrest. (*People v. Scott* (1924) 66 Cal.App. 200, 203 [225 P. 767]; *People v. Wells, supra,* 187 Cal.App.2d at p.329.)

f. Assuming a false name and being unable to find the person from whom the defendant claimed to have received the property. (*People v. Cox* (1916) 29 Cal.App. 419, 422 [155 P. 1010].)

g. Sale of property under a false name and at an inadequate price. (*People v. Majors* (1920) 47 Cal.App. 374, 375 [190 P. 636].)

h. Sale of property with identity marks removed (*People v. Miller* (1920) 45 Cal.App. 494, 496–497 [188 P. 52]) or removal of serial numbers (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1401 [34 Cal.Rptr.2d 324]).

i. Modification of the property. (*People v. Esquivel, supra,* 28 Cal.App.4th at p. 1401 [shortening barrels of shotguns].)

j. Attempting to throw away the property. (*People v. Crotty* (1925) 70 Cal.App. 515, 518–519 [233 P. 395].)

AUTHORITY

- Instructional Requirements. *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172 [94 Cal.Rptr.2d 727]; see *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449].
- This Instruction Upheld. *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577 [64 Cal.Rptr.3d 116]; *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036 [63 Cal.Rptr.3d 659].
- Corroboration Defined. See Pen. Code, § 1111; *People v. McFarland* (1962) 58 Cal.2d 748, 754–755 [26 Cal.Rptr. 473, 376 P.2d 449].
- Due Process Requirements for Permissive Inferences. *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165 [99 S.Ct. 2213, 60 L.Ed.2d 777]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454–455 [27 Cal.Rptr.2d 451].
- Examples of Corroborative Evidence. *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209].
- Recently Stolen. *People v. Anderson* (1989) 210 Cal.App.3d 414,

421–422 [258 Cal.Rptr. 482]; *People v. Lopez* (1954) 126 Cal.App.2d 274, 278 [271 P.2d 874].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 13 [in context of larceny]; § 82 [in context of receiving stolen property]; § 86 [in context of robbery]; § 135 [in context of burglary].

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 526 [presumptions].

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 62; Circumstantial Evidence, § 129.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

[I have explained that (the/a) defendant may be guilty of a crime if (he/she) either commits the crime or aids and abets the crime. (He/She) may also be guilty if (he/she) is a member of a conspiracy.]

(The defendant[s]/Defendant[s] _____ *<insert name[s]>*) **(is/are) charged [in Count _____] with conspiracy to commit** _____ *<insert alleged crime[s]>* **[in violation of Penal Code section 182].**

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or]** _____ *<insert name[s] or description[s] of coparticipant[s]>***) to commit** _____ *<insert alleged crime[s]>***;**
2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit** _____ *<insert alleged crime[s]>***;**
3. **(The/One of the) defendant[s][,] [or** _____ *<insert name[s] or description[s] of coparticipant[s]>***][,] [or (both/all) of them] committed [at least one of] the following alleged overt act[s] to accomplish** _____ *<insert alleged crime[s]>***:** _____ *<insert the alleged overt acts>***;**

AND

4. **[At least one of these/This] overt act[s] was committed in California placeholder.**

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit _____ *<insert alleged crime[s]>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

The People must prove that the members of the alleged conspiracy

had an agreement and intent to commit _____ <*insert alleged crime[s]*>. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime[s].

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]

[The People allege that the defendant[s] conspired to commit the following crimes: _____ <*insert alleged crime[s]*>. You may not find (the/a) defendant guilty of conspiracy unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) If the defendant is charged with conspiracy to commit murder, do not give this instruction. Give CALCRIM No. 563, *Conspiracy to Commit Murder*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give this instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if "the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . . ." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) A unanimity instruction is not required if there is "merely possible uncertainty on how the defendant is guilty of a particular conspiracy." (*People v. Russo, supra,* 25 Cal.4th at p. 1135.) Thus, the jury need not unanimously agree as to what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra*, 25 Cal.4th at pp. 1135–1136.) However, it appears that a unanimity instruction is required when the prosecution alleges multiple crimes that may have been the target of the conspiracy. (See *People v. Diedrich, supra,* 31 Cal.3d at pp. 285–286 [approving of unanimity instruction as to crime that was target of conspiracy]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210] [not error to decline to give unanimity instruction; if was error, harmless].) Give the bracketed paragraph that begins, "The People alleged that the defendant[s] conspired to commit the following crimes," if multiple crimes are alleged as target offenses of the conspiracy. Give the bracketed sentence regarding the degree of the crime if any target felony has different punishments for different degrees. (See Pen. Code, § 182(a).) The court must also give the jury a verdict form on which it can state the specific crime or crimes that the jury unanimously agrees the defendant conspired to commit.

In addition, if a conspiracy case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo, supra,* 25 Cal.4th at p. 1136, fn. 2; see also Related Issues section below on statute of limitations.)

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with "You must make a separate decision," if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal From Conspiracy*.

AUTHORITY

- Elements. Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy. *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].
- Elements of Underlying Offense. *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].

- Two Specific Intents. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other ground in People v. Cortez (1998) 18 Cal.4th 1223, 1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Unanimity on Specific Overt Act Not Required. *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Unanimity on Target Offenses of Single Conspiracy. *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564 [110 Cal.Rptr.2d 210].
- Penal Code Section 182 Refers to Crimes Under California Law Only. *People v. Zacarias* (2007) 157 Cal.App.4th 652, 660 [69 Cal.Rptr.3d 81].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 68–97.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][i], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02, 141.10 (Matthew Bender).

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Ass'n* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

LESSER INCLUDED OFFENSES

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook* (2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1370 [269 Cal.Rptr. 900]. Alternatively, the court may look to the overt acts

in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra,* 91 Cal.App.4th at pp. 919–920, 922; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [54 Cal.Rptr.2d 608] [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

RELATED ISSUES

Acquittal of Coconspirators

The "rule of consistency" has been abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865 [103 Cal.Rptr.2d 13, 15 P.3d 234].)

Conspiracy to Collect Insurance Proceeds

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds. (*People v. Leach* (1975) 15 Cal.3d 419, 435 [124 Cal.Rptr. 752, 541 P.2d 296].)

Death of Coconspirator

A surviving conspirator is liable for proceeding with an overt act after the death of his or her coconspirator. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262 [98 Cal.Rptr.2d 737].)

Factual Impossibility

Factual impossibility of accomplishing a substantive crime is not a defense to conspiracy to commit that crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131 [54 Cal.Rptr.2d 578]; see also *United States v. Jimenez Recio* (2003) 537 U.S. 270, 274–275 [123 S.Ct. 819, 154 L.Ed.2d 744] [rejecting the rule that a conspiracy ends when the object of the conspiracy is defeated].)

Statute of Limitations

The defendant may assert the statute of limitations defense for any felony that is the primary object of the conspiracy. The limitations period begins to run with the last overt act committed in furtherance of the conspiracy. (*Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 410 [173 Cal.Rptr. 906]; *People v. Crosby* (1962) 58 Cal.2d 713, 728 [25 Cal.Rptr. 847, 375 P.2d 839]; see Pen. Code, §§ 800, 801.) If the substantive offense that is the primary object of the conspiracy is successfully attained, the statute begins to run at the same time as for the substantive offense. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].) "[I]f there is a question regarding the statute of limitations, the court may have to require

the jury to agree an overt act was committed within the limitations period." (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641] [dicta].) See generally CALCRIM No. 3410, *Statute of Limitations* and CALCRIM No. 3500, *Unanimity*.

Supplier of Goods or Services

A supplier of lawful goods or services put to an unlawful use is not liable for criminal conspiracy unless he or she both knows of the illegal use of the goods or services and intends to further that use. The latter intent may be established by direct evidence of the supplier's intent to participate, or by inference based on the supplier's special interest in the activity or the aggravated nature of the crime itself. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476–477, 482 [59 Cal.Rptr. 628].)

Wharton's Rule

If the cooperation of two or more persons is necessary to commit a substantive crime, and there is no element of an alleged conspiracy that is not present in the substantive crime, then the persons involved cannot be charged with both the substantive crime and conspiracy to commit the substantive crime. (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815 [168 Cal.Rptr. 252] [known as Wharton's Rule or "concert of action" rule].)

420. Withdrawal From Conspiracy

The defendant is not guilty of conspiracy to commit _____ <*insert target offense*> if (he/she) withdrew from the alleged conspiracy before any overt act was committed. To withdraw from a conspiracy, the defendant must truly and affirmatively reject the conspiracy and communicate that rejection, by word or by deed, to the other members of the conspiracy known to the defendant.

[A failure to act is not sufficient alone to withdraw from a conspiracy.]

[If you decide that the defendant withdrew from a conspiracy after an overt act was committed, the defendant is not guilty of any acts committed by remaining members of the conspiracy after (he/she) withdrew.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy [before an overt act was committed]. If the People have not met this burden, you must find the defendant not guilty of conspiracy. [If the People have not met this burden, you must also find the defendant not guilty of the additional acts committed after (he/she) withdrew.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence that the defendant attempted to withdraw from the conspiracy.

AUTHORITY

- Withdrawal From Conspiracy as Defense. *People v. Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839].
- Ineffective Withdrawal. *People v. Sconce* (1991) 228 Cal.App.3d 693, 701 [279 Cal.Rptr. 59]; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003 [95 Cal.Rptr. 360].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[6], [7] (Matthew Bender).

570. Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, § 192(a))

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. **The defendant was provoked;**
2. **As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;**

AND

3. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.**

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

[If enough time passed between the provocation and the killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the killing is not reduced to

voluntary manslaughter on this basis.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

Related Instructions

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion*.

AUTHORITY

- Elements. Pen. Code, § 192(a).
- Heat of Passion Defined. *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].
- "Average Person" Need Not Have Been Provoked to Kill, Just to Act Rashly and Without Deliberation. *People v. Najera* (2006) 138 Cal.App.4th 212, 223 [41 Cal.Rptr.3d 244].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 207–219.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824-825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rtpr.2d 553].)

RELATED ISSUES

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [138 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [325 P.2d 97]).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [64 Cal.Rptr.2d 282]); insulting words or gestures (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91 [13 Cal.Rptr. 277]); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555–1556 [38 Cal.Rptr.2d 859]); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 755 P.2d 960]); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608]); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246–1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11

[77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779].)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion." (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Heat of Passion: Defendant Initial Aggressor

"[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1312–1313 [7 Cal.Rptr.3d 161].)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377 [202 P.2d 18]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777].) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [120 Cal.Rptr.2d 432, 47 P.3d 225] [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion that is insufficient to reduce a murder to manslaughter may nonetheless reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about the idea of premeditation or deliberation].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745,

752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid*.)

571. Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense (Pen. Code, § 192)

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. **The defendant actually believed that (he/she/ [or] someone else/ _____ <*insert name of third party*>) was in imminent danger of being killed or suffering great bodily injury;**

AND

2. **The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;**

BUT

3. **At least one of those beliefs was unreasonable.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

[If you find that _____ <*insert name of decedent/victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant knew that _____ <*insert name of decedent/victim*> had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of decedent/victim*>, you may consider that threat in evaluating the defendant's beliefs.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

See discussion of imperfect self-defense in related issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part by *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on

justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.

AUTHORITY

- Elements. Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Michaels* (2002) 28 Cal.4th 486, 529–531 [122 Cal.Rptr.2d 285, 49 P.3d 1032].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 210.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][c], [2][a] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

RELATED ISSUES

Battered Woman's Syndrome

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

Blakeley *Not Retroactive*

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566,

576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. "Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant." (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid*.)

See also the Related Issues Section to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

580. Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))

When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.

The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

The defendant committed involuntary manslaughter if:

1. **The defendant (committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence);**

AND

2. **The defendant's acts unlawfully caused the death of another person.**

[The People allege that the defendant committed the following crime[s]: _____ *<insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)>***.**

Instruction[s] _____ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)>***.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ *<insert act[s] alleged>***.]**

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury;

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747].) See also CALCRIM No. 620, *Causation: Special Issues*.

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180,

957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

- Involuntary Manslaughter Defined. Pen. Code, § 192(b).
- Due Caution and Circumspection. *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unlawful Act Not Amounting to a Felony. *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder, but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

There is no crime of attempted involuntary manslaughter. (*People v. Johnson*

(1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a "mitigating circumstance" that "reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675] [discussing dissenting opinion of Mosk, J.].) Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*.

593. Misdemeanor Vehicular Manslaughter (Pen. Code, § 192(c)(2))

<If misdemeanor vehicular manslaughter—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>

[The defendant is charged [in Count _____] with vehicular manslaughter [in violation of Penal Code section 192(c)(2)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>

[Vehicular manslaughter with ordinary negligence is a lesser crime than (gross vehicular manslaughter while intoxicated/ [and] gross vehicular manslaughter/ [and] vehicular manslaughter with ordinary negligence while intoxicated.)]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that:

1. **While (driving a vehicle/operating a vessel), the defendant committed (a misdemeanor[,]/ [or] an infraction[,]/ [or] an otherwise lawful act with ordinary negligence);**
2. **The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) was dangerous to human life under the circumstances of its commission;**

AND

3. **The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) caused the death of another person.**

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ *<insert misdemeanor[s]/ infraction[s]>***.**

Instruction[s] _____ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s]>***.]**

[The People [also] allege that the defendant committed the following otherwise lawful act[s] with ordinary negligence: _____ *<insert act[s] alleged>***.]**

[The difference between this offense and the charged offense of gross vehicular manslaughter is the degree of negligence required. I have already defined gross negligence for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).**

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] lawful act[s] that might cause death): _____ <*insert alleged predicate acts when multiple acts alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion. In the definition of ordinary negligence, the court should use the entire phrase "harm to oneself or someone else" if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the

bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence. Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act. *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence. Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 592, *Gross Vehicular Manslaughter*.

600. Attempted Murder (Pen. Code, §§ 21a, 663, 664)

The defendant is charged [in Count _____] with attempted murder.

To prove that the defendant is guilty of attempted murder, the People must prove that:

1. **The defendant took at least one direct but ineffective step toward killing (another person/ [or] a fetus);**

AND

2. **The defendant intended to kill that (person/ [or] fetus).**

A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.]

[A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, the People must prove that the defendant not only intended to kill _____ <*insert name of primary target alleged*> but also either intended to kill _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the

defendant intended to kill _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill _____ <*insert name of primary target alleged*> by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of _____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>.]

[The defendant may be guilty of attempted murder even if you conclude that murder was actually completed.]

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which occurs at seven to eight weeks of development.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempted murder when charged, or if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on lesser included offenses in homicide generally].)

The second bracketed paragraph is provided for cases in which the prosecution theory is that the defendant created a "kill zone," harboring the specific and concurrent intent to kill others in the zone. (*People v. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Id.* at p. 329.)

The *Bland* court stated that a special instruction on this issue was not required. (*Id*. at p. 331, fn. 6.) The bracketed language is provided for the court to use at its discretion.

Give the next-to-last bracketed paragraph when the defendant has been

charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

CALCRIM No. 601, *Attempted Murder: Deliberation and Premeditation*.

CALCRIM No. 602, *Attempted Murder: Peace Officer, Firefighter, Custodial Officer, or Custody Assistant*.

CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

CALCRIM No. 604, *Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 663, 664.
- Murder Defined. Pen. Code, § 187.
- Specific Intent to Kill Required. *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02[3]; Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.20; Ch. 142, *Crimes Against the Person,* § 142.01[3][e] (Matthew Bender).

LESSER INCLUDED OFFENSES

Attempted voluntary manslaughter is a lesser included offense. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].)

RELATED ISSUES

Specific Intent Required

"[T]he crime of attempted murder requires a specific intent to kill . . . ." (*People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].)

> In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice. Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709].)

Solicitation

Attempted solicitation of murder is a crime. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 460 [94 Cal.Rptr.2d 910].)

Single Bullet, Two Victims

A shooter who fires a single bullet at two victims who are both in his line of fire can be found to have acted with express malice toward both victims. (*People v. Smith* (2005) 37 Cal.4th 733, 744].)

No Attempted Involuntary Manslaughter

"[T]here is no such crime as attempted involuntary manslaughter." (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

Transferred and Concurrent Intent

"[T]he doctrine of transferred intent does not apply to attempted murder." (*People v. Bland* (2002) 28 Cal.4th 313, 331 [121 Cal.Rptr.2d 546, 48 P.3d 1107].) "[T]he defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred, intent theory." (*Id.*)

763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)

In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.

An *aggravating circumstance or factor* is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A *mitigating circumstance or factor* is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The factors are:

(a) The circumstances of the crime[s] of which the defendant was convicted in this case and any special circumstances that were found true.

(b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* is criminal activity involving the unlawful use, attempt to use, or direct or implied threat to use force or violence against a person. [The other violent criminal activity alleged in this case will be described in these instructions.]

(c) Whether or not the defendant has been convicted of any

prior felony other than the crime[s] of which (he/she) was convicted in this case.

(d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.

(e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.

(g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.

(i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.

(j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.

(k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

Do not consider the absence of a mitigating factor as an aggravating factor.

[You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.]

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]

[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision. [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]

New January 2006; Revised August 2006, June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Although not required, "[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record." (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are "applicable." (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with "The other violent criminal activity alleged in this case." (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].) The court also has a **sua sponte** duty to give CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give CALCRIM No. 765, *Death Penalty:*

Conviction for Other Felony Crimes in addition to this instruction.

On request, the court must instruct the jury not to double-count any "circumstances of the crime" that are also "special circumstances." (*People v. Melton, supra,* 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with "Even if a fact is both a 'special circumstance' and also a 'circumstance of the crime'."

On request, give the bracketed sentence that begins with "You may not let sympathy for the defendant's family." (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 [79 Cal.Rptr.2d 408, 966 P.2d 442].) On request, give the bracketed sentence that begins with "However, you may consider evidence about the impact the defendant's execution." *(Ibid.)*

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy. *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors. *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Must Instruct to Consider Only "Applicable Factors". *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Mitigating Factor Must Be Supported by Evidence. *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].
- Aggravating and Mitigating Defined. *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors. *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. *People v. Melton* (1988) 44 Cal.3d

713, 760 [244 Cal.Rptr. 867, 750 P.2d 741]; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].

- Must Instruct to Not Double-Count. *People v. Melton* (1988) 44 Cal.3d 713, 768 [244 Cal.Rptr. 867, 750 P.2d 741].
- Threats of Violence Must Be Directed at Persons. *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 462, 466–467, 475, 480, 483–484, 493–497.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23, 87.24 (Matthew Bender).

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse,* the Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." The committee has rephrased this for clarity and included in the text of this instruction, "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case." (People v. Hillhouse (2002) 27 Cal.4th 469, 509, fn. 6 [117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789].)

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In *People v. Musselwhite, supra,* 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . ." (italics in original).

915. Simple Assault (Pen. Code, §§ 240, 241(a))

The defendant is charged [in Count _____] with assault [in violation of Penal Code section 241(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
2. **The defendant did that act willfully;**
3. **When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**

[AND]

4. **When the defendant acted, (he/she) had the present ability to apply force to a person(;/.)**

<Give element 5 when instructing on self-defense or defense of another>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually

intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519].)

AUTHORITY

- Elements. Pen. Code, § 240.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197]; *People v. Wright* (2002) 100 Cal.App.4th 703, 706 [123 Cal.Rptr.2d 494].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1193–1195 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 6–11, 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142,

Crimes Against the Person, § 142.11 (Matthew Bender).

RELATED ISSUES

Transferred Intent

The doctrine of transferred intent does not apply to general intent crimes such as assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737 [34 Cal.Rptr.2d 723].)

945. Battery Against Peace Officer (Pen. Code, §§ 242, 243(b), (c)(2))

The defendant is charged [in Count _____] with battery against a peace officer [in violation of Penal Code section 243].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<Insert officer's name, excluding title>* **was a peace officer performing the duties of (a/an)** _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>***;**
2. **The defendant willfully [and unlawfully] touched** _____ *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that** _____ *<insert officer's name, excluding title>* **was a peace officer who was performing (his/her) duties(;/.)**

<Give element 4 when instructing on felony battery against a peace officer.>

[AND

4. _____ *<insert officer's name, excluding title>* **suffered injury as a result of the touching(;/.)]**

<Give element 5 when instructing on self-defense or defense of another.>

[AND

5. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

<Do not give this paragraph when instructing on felony battery against a peace officer.>

[The slightest touching can be enough to commit a battery if it is

done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

<Give this definition when instructing on felony battery against a peace officer.>

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">*.**]**

[The duties of a _____ *<insert title of officer>* **include** _____ *<insert job duties>*.**]**

[It does not matter whether _____ *<insert officer's name, excluding title>* **was actually on duty at the time.]**

[A _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>* **is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]**

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction

2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2006, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if that is an issue.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged

victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Physical Injury Defined. Pen. Code, § 243(f)(5); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17–18 [40 Cal.Rptr.2d 213].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault on Specified Victim. Pen. Code, § 241(b).
- Battery. Pen. Code, § 242.
- Misdemeanor Battery on Specified Victim. Pen. Code, § 243(b).
- Resisting Officer. Pen. Code, § 148.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and

2670, *Lawful Performance: Peace Officer*.

1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count _____] with soliciting another person to engage in lewd conduct in public [in violation of Penal Code section 647(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant requested [or _____ <*insert other synonyms for "solicit," as appropriate*>] that another person engage in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;**
2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**
3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**
4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**
5. **When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

[AND]

6. **The defendant knew or reasonably should have known that someone was likely to be present who could be offended by the requested conduct(;/.)**

<*Give element 7 when instructing that person solicited must receive message; see Bench Notes.*>

[AND

7. **The other person received the communication containing the request.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised August 2006, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements. Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Likely Defined. *People v. Lake* (2007) 156 Cal.App.4th Supp. 1 [67 Cal.Rptr.3d 452].
- Solicitation Requires Specific Intent. *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined. *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30

Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 46–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

1191. Evidence of Uncharged Sex Offense

The People presented evidence that the defendant committed the crime[s] of _____ <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged sex offense[s]*>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged sex offense[s]*>. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21

Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence]; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.1112(e) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

Evidence Code section 1108(a) provides that "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101." Subdivision (d)(1) defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following[,]" listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc*.

CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*.

CALCRIM No. 853, *Evidence of Uncharged Abuse to Elder or Dependent Person*.

AUTHORITY

- Instructional Requirement. Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- CALCRIM No. 1191 Upheld. *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [57 Cal.Rptr.3d 922]; *People v. Cromp* (2007) 153

Cal.App.4th 476, 480 [62 Cal.Rptr.3d 848].

- Sexual Offense Defined. Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Hill* (2001) 86 Cal.App.4th 273, 277-278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [same].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 96–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

COMMENTARY

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

> If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged sex offense*>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of _____ <*insert charged sex offense*>. The People must still prove (the/each) (charge/

[and] allegation) of _____ <*insert charged sex offense*> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

Rebuttal Evidence

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible

"[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

Evidence of Acquittal

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc*.

1301. Stalking (Pen. Code, § 646.9(a), (e)–(h))

The defendant is charged [in Count _____] with stalking [in violation of Penal Code section 646.9].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;**

[AND]

2. **The defendant made a credible threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family](;/.)**

<Give element 3 if the defendant is charged with stalking in violation of a court order, Pen. Code, § 646.9(b).>

[AND]

[3. A/An (temporary restraining order/injunction/ _____ *<describe other court order>*) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct(;/.)]

<Give element 4 when instructing on conduct that was constitutionally protected.>

[AND

4. **The defendant's conduct was not constitutionally protected.]**

A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears to be able to carry out.

A *credible threat* may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.

***Harassing* means engaging in a knowing and willful course of conduct directed at a specific person that seriously annoys, alarms,**

torments, or terrorizes the person and that serves no legitimate purpose. A course of conduct means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure someone else.

[_____ <*Describe type of activity; see Bench Notes below*> is constitutionally protected activity.]

[*Repeatedly* means more than once.]

[The People do not have to prove that a person who makes a threat intends to actually carry it out.]

[Someone who makes a threat while in prison or jail may still be guilty of stalking.]

[A threat may be made electronically by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers, and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

[The terms and conditions of (a/an) (restraining order/injunction/ _____ <*describe other court order*>) remain enforceable despite the parties' actions, and may only be changed by court order.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 3 if the defendant is charged with stalking in violation of a

temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).)

If the defendant argues that his or her conduct or threat was constitutionally protected, give element 4. (See Pen. Code, § 646.9(f), (g).) The court must then further instruct on the type of constitutionally protected activity involved. (See the optional bracketed paragraph regarding constitutionally protected activity.) Examples of constitutionally protected activity include speech, protest, and assembly. (See Civ. Code, § 1708.7(f) [civil stalking statute].)

The bracketed sentence that begins with "The People do not have to prove that" may be given on request. (See Pen. Code, § 646.9(g).)

The bracketed sentence about the defendant's incarceration may be given on request if the defendant was in prison or jail when the threat was made. (See Pen. Code, § 646.9(g).)

Give the bracketed definition of "electronic communication" on request. (See Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining "immediate family" should be given on request. (See Pen. Code, § 646.9(*l*); see Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If the defendant argues that the alleged victim acquiesced to contact with the defendant contrary to a court order, the court may, on request, give the last bracketed paragraph stating that such orders may only be changed by the court. (See Pen. Code, § 13710(b); *People v. Gams* (1996) 52 Cal.App.4th 147, 151–152, 154–155 [60 Cal.Rptr.2d 423].)

AUTHORITY

- Elements. Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear. *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].
- Repeatedly Defined. *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].
- Safety Defined. *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720

[91 Cal.Rptr.2d 851]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624].

- Substantial Emotional Distress Defined. *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; see *People v. Carron* (1995) 37 Cal.App.4th 1230, 1240–1241 [44 Cal.Rptr.2d 328].
- Victim's Fear Not Contemporaneous With Stalker's Threats. *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195–1197 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 294–297.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Stalking. Pen. Code, §§ 664, 646.9.

RELATED ISSUES

Harassment Not Contemporaneous With Fear

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].)

Constitutionality of Terms

The term "credible threat" is not unconstitutionally vague. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1230 [61 Cal.Rptr.2d 176].) The element that the objectionable conduct "serve[] no legitimate purpose" (Pen. Code, § 646.9(e) is also not unconstitutionally vague; "an ordinary person can reasonably understand what conduct is expressly prohibited." (*People v. Tran* (1996) 47 Cal.App.4th 253, 260 [54 Cal.Rptr.2d 650].)

Labor Picketing

Section 646.9 does not apply to conduct that occurs during labor picketing. (Pen. Code, § 646.9(i).)

1400. Active Participation in Criminal Street Gang (Pen. Code, § 186.22(a))

The defendant is charged [in Count _____] with participating in a criminal street gang [in violation of Penal Code section 186.22(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant actively participated in a criminal street gang;**
2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

   a. **directly and actively committing a felony offense;**

OR

   b. **aiding and abetting a felony offense.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

<If criminal street gang has already been defined>

[A *criminal street gang* is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**

2. That has, as one or more of its primary activities, the commission of _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)*>;

AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ <*insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)*> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)*>;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ <*insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)*>

AND

[at least one of the following crimes:] _____ *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>***;**

2. At least one of those crimes was committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place.

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

***Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]:** _____ *<insert felony*

or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>.

[To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies listed immediately above*>, please refer to the separate instructions that I (will give/ have given) you on (that/those) crime[s].]

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that:

1. **A member of the gang committed the crime;**
2. **The defendant knew that the gang member intended to commit the crime;**
3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

New January 2006; Revised August 2006, June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].) Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the

felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

The court should also give the appropriate instructions defining the elements of crimes inserted in list of alleged "primary activities," or the the definition of "pattern of criminal gang activity" that have not been established by prior convictions or sustained juvenile petitions. The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "felonious criminal conduct."

On request, give the bracketed paragraph that begins with "The People do not need to prove that the defendant devoted all or a substantial part of . . . ." (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a

sua sponte duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1)(Felony) and § 186.22(d)(Felony or Misdemeanor))*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

AUTHORITY

- Elements. Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined. Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined. Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined. *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at p. 1458 [original italics].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

RELATED ISSUES

Conspiracy

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to

commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity

The "continuous-course-of-conduct exception" applies to the "pattern of criminal gang activity" element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

1401. Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1)(Felony) and § 186.22(d)(Felony or Misdemeanor))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those crime[s])][,][or the lesser offense[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[You must also decide whether the crime[s] charged in Count[s] _____ (was/were) committed on the grounds of, or within 1,000 feet of a public or private (elementary/ [or] vocational/ [or] junior high/ [or] middle school/ [or] high) school open to or being used by minors for classes or school-related programs at the time.]

To prove this allegation, the People must prove that:

1. **The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang;**

AND

2. **The defendant intended to assist, further, or promote criminal conduct by gang members.**

<*If criminal street gang has already been defined*>

[A criminal street gang is defined in another instruction to which you should refer.]

<*If criminal street gang has not already been defined in another instruction*>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**
2. **That has, as one or more of its primary activities, the**

commission of _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>***;**

AND

3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,] [or]/ attempted commission of[,] [or]/conspiracy to commit[,] [or]/ solicitation to commit[,] [or]/conviction of[,] [or]/ (Having/having) a juvenile petition sustained for commission of):

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>***;**

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*

AND

[at least one of the following crimes:] _____ *<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>***;**

2. **At least one of those crimes was committed after September 26, 1988;**
3. **The most recent crime occurred within three years of one of the earlier crimes;**

AND

4. **The crimes were committed on separate occasions or were personally committed by two or more persons.]**

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[The People need not prove that the defendant is an active or current member of the alleged criminal street gang.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

<The court may give the following paragraph when one of the predicate crimes is not established by a prior conviction or a currently charged offense>

[To decide whether a member of the gang [or the defendant] committed _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(33)>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised August 2006, June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra,* 26 Cal.4th at 323–324.)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

The court should also give the appropriate instructions defining the elements of crimes inserted in the list of alleged "primary activities," or the definition of "pattern of criminal gang activity" that have not been established by prior convictions or sustained juvenile petitions.

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran*

(2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Gang Evidence*.

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [16 Cal.Rptr.3d 880, 94 P.3d 1080].)

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

AUTHORITY

- Enhancement. Pen. Code, § 186.22(b)(1).
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required. *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined. *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03 (Matthew Bender).

RELATED ISSUES

Commission On or Near School Grounds

In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant's underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

Wobblers

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 [135 Cal.Rptr.2d 30, 69 P.3d 951].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449 [118 Cal.Rptr.2d 380].)

Murder—Enhancements Under Penal Code section 186.22(b)(1) May Not Apply at Sentencing

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes "punishable by imprisonment in the state prison for life . . ." (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the ten-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang may not apply in some sentencing situations involving the crime of murder.

See also the Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

1600. Robbery (Pen. Code, § 211)

The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took property that was not (his/her) own;**
2. **The property was taken from another person's possession and immediate presence;**
3. **The property was taken against that person's will;**
4. **The defendant used force or fear to take the property or to prevent the person from resisting;**

AND

5. **When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A (store/ [or] business) (employee/ _____ <*insert description*>) may be robbed if property of the (store/ [or] business) is taken, even though he or she does not own the property and was not, at that moment, in immediate physical

control of the property. If the facts show that the (employee/ _____ <*insert description*>) was a representative of the owner of the property and the (employee/ _____ <*insert description*>) expressly or implicitly had authority over the property, then that (employee/ _____ <*insert description*>) may be robbed if property of the (store/ [or] business) is taken by force or fear.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

Give the bracketed definition of "against a person's will" on request.

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See

CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

AUTHORITY

- Elements. Pen. Code, § 211.
- Fear Defined. Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Robbery of Store Employee or Contractor. *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115–1117 [131 Cal.Rptr.2d 319]; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521–522 [3 Cal.Rptr.3d 835].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Property, § 86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive

possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

- Attempted Robbery. Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile. Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d

346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

RELATED ISSUES

Asportation—Felonious Taking

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies where a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945-950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

Force—Amount

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that the force employed by a pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also

People v. Wright (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

Force—When Applied

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is a distance away from property taken].) Property has also been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds

in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

1650. Carjacking (Pen. Code, § 215)

The defendant is charged [in Count _____] with carjacking [in violation of Penal Code section 215].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took a motor vehicle that was not (his/her) own;**
2. **The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;**
3. **The vehicle was taken against that person's will;**
4. **The defendant used force or fear to take the vehicle or to prevent that person from resisting;**

AND

5. **When the defendant used force or fear to take the vehicle, (he/she) intended to deprive the other person of possession of the vehicle either temporarily or permanently.**

The defendant's intent to take the vehicle must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit carjacking.

A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[A vehicle is within a person's *immediate presence* if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary to CALCRIM No. 1600, *Robbery*.

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements. Pen. Code, § 215.
- Fear Defined. Pen. Code, § 212.
- Immediate Presence Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Medina* (1995) 39 Cal.App.4th 643, 650 [46 Cal.Rptr.2d 112].
- Possession Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143–1144 [47 Cal.Rptr.2d 343].
- Carjacking Crime Against Possession, not Ownership, of Vehicle. *People v. Cabrera* (2007) 152 Cal.App.4th 695, 701–702 [61 Cal.Rptr.3d 373].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes—Person, § 276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10[2][b], 142.10A (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Carjacking. Pen. Code, §§ 663, 215; see *People v. Jones* (1999) 75 Cal.App.4th 616, 628 [89 Cal.Rptr.2d 485].

Neither theft or robbery is a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48] [theft]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [45 Cal.Rptr.2d 153] [robbery].) Vehicle theft (Veh. Code, § 10851(a)) is not a lesser included offense of carjacking. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].)

Attempted grand theft auto is not a lesser included offense of attempted carjacking. *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1066 [62 Cal.Rptr.3d 31].

RELATED ISSUES

Force—Timing

Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, "in no way depends on whether the confrontation and use of force or fear occurs before, while, or after the defendant initially takes possession of the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133 [66 Cal.Rptr.2d 72].)

Asportation—Felonious Taking

"Felonious taking" has the same meaning in carjacking as in robbery. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [6 Cal.Rptr.3d 432, 79 P.3d 548].) To satisfy the asportation requirement for robbery, no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim. [S]light movement is enough to satisfy the asportation requirement. (*Id.* at p. 1061 [internal quotation marks and citations omitted].) The taking can occur whether or not the victim remains with the car. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1375–1377 [106 Cal.Rptr.2d 812].) Carjacking can also occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [although victim was not physically present in the parking lot when defendant drove the car away, she had been forced to relinquish her car keys].)

1804. Theft by False Pretense (Pen. Code § 484)

The defendant is charged [in Count _____] with [grand/petty] theft by false pretense [in violation of Penal Code section 484].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant knowingly and intentionally deceived a property owner [or the owner's agent] by false or fraudulent representation or pretense;**
2. **The defendant did so intending to persuade the owner [or the owner's agent] to let the defendant [or another person] take possession and ownership of the property;**

AND

3. **The owner [or the owner's agent] let the defendant [or another person] take possession and ownership of the property because the owner [or the owner's agent] relied on the representation or pretense.**

You may not find the defendant guilty of this crime unless the People have proved that:

[A. The false pretense was accompanied by either a writing or false token(;/.)]

[OR]

[(A/B). There was a note or memorandum of the pretense signed or handwritten by the defendant(;/.)]

[OR]

[(A/B/C). Testimony from two witnesses or testimony from a single witness along with other evidence supports the conclusion that the defendant made the pretense.]

[*Property* includes money, labor, and real or personal property.]

A *false pretense* is any act, word, symbol, or token the purpose of which is to deceive.

[Someone makes a false pretense if, intending to deceive, he or she does [one or more of] the following:

[1. Gives information he or she knows is false(./;)]

[OR

2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth(./;)]

[OR

3. Does not give information when he or she has an obligation to do so(./;)]

[OR

4. Makes a promise not intending to do what he or she promises.]]

[Proof that the representation or pretense was false is not enough by itself to prove that the defendant intended to deceive.]

[Proof that the defendant did not perform as promised is not enough by itself to prove that the defendant did not intend to perform as promised.]

[A false token is a document or object that is not authentic, but appears to be, and is used to deceive.]

[For petty theft, the property taken can be of any value, no matter how slight.]

[An owner [or an owner's agent] relies on false pretense, if the falsehood is an important part of the reason the owner [or agent] decides to give up the property. The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considers in making the decision. [If the owner [or agent] gives up property some time after the pretense is made, the owner [or agent] must do so because he or she relies on the pretense.]]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

New January 2006; Revised August 2006, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime, including the corroboration requirements stated in Penal Code section 532(b).

(*People v. Mason* (1973) 34 Cal.App.3d 281, 286 [109 Cal.Rptr. 867] [error not to instruct on corroboration requirements].)

Related Instructions

If the defendant is also charged with grand theft, give CALCRIM No. 1801, *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

- Elements. Pen. Code § 484; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842 [52 Cal.Rptr.2d 765]; see *People v. Webb* (1999) 74 Cal.App.4th 688, 693–694 [88 Cal.Rptr.2d 259] [false statement of opinion].
- Corroboration Requirements. Pen. Code § 532(b); *People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Fujita* (1974) 43 Cal.App.3d 454, 470–471 [117 Cal.Rptr. 757].
- Agent. *People v. Britz* (1971) 17 Cal.App.3d 743, 753 [95 Cal.Rptr. 303].
- Reckless Misrepresentation. *People v. Schmitt* (1957) 155 Cal.App.2d 87, 110 [317 P.2d 673]; *People v. Ryan* (1951) 103 Cal.App.2d 904, 908–909 [230 P.2d 359].
- Defendant Need Not Be Beneficiary of Theft. *People v. Cheeley* (1951) 106 Cal.App.2d 748, 753.
- Reliance. *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842–1843 [52 Cal.Rptr.2d 765] [defining reliance]; *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413 [79 Cal.Rptr.2d 806] [reversible error to fail to instruct on reliance]; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1152–1153 [43 Cal.Rptr.2d 163] [no reliance if victim relies solely on own investigation].
- Theft of Real Property by False Pretenses. *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].
- Theft by False Pretenses Includes Obtaining Loan by False Pretenses. *Perry v. Superior Court of Los Angeles County* (1962) 57 Cal.2d 276, 282–283 [19 Cal.Rptr.1, 368 P.2d 529].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against

Property, §§ 12, 64.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.

RELATED ISSUES

Attempted Theft by False Pretense

Reliance on the false pretense need not be proved for a person to be guilty of attempted theft by false pretense. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [117 Cal.Rptr. 757].)

Continuing Nature of False Pretense

Penal Code section 484 recognizes that theft by false pretense is a crime of a continuing nature and covers any "property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question." (Pen. Code, § 484(a).)

Corroboration–Defined/Multiple Witnesses

"Corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way so as to reasonably satisfy the jury that the complaining witness is telling the truth." (*People v. Fujita* (1974) 43 Cal.App.3d 454, 470 [117 Cal.Rptr. 757].) When considering if the pretense is corroborated the jury may consider "the entire conduct of the defendant, and his declarations to other persons." (*People v. Wymer* (1921) 53 Cal.App. 204, 206 [199 P. 815].) The test for corroboration of false pretense is the same as the test for corroborating the testimony of an accomplice in Penal Code section 1111. (*Ibid.*; see also *People v. MacEwing* (1955) 45 Cal.2d 218, 224 [288 P.2d 257].) To establish corroboration by multiple witnesses, the witnesses do not have to testify to the same false pretense. The requirement is satisfied as long as they testify to the same scheme or type of false pretense. (*People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Ashley* (1954) 42 Cal.2d 246, 268 [267 P.2d 271].)

Distinguished from Theft by Trick

Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of

the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258 [267 P.2d 271]; *People v. Randono* (1973) 32 Cal.App.3d 164, 172 [108 Cal.Rptr. 326].) False pretenses does not require that the title pass perfectly and the victim may even retain a security interest in the property transferred to the defendant. (*People v. Counts* (1995) 31 Cal.App.4th 785, 789–792 [37 Cal.Rptr.2d 425].)

Fraudulent Checks

If a check is the basis for the theft by false pretense, it cannot also supply the written corroboration required by statute. (*People v. Mason* (1973) 34 Cal.App.3d 281, 288 [109 Cal.Rptr. 867].)

Genuine Writings

A genuine writing that is falsely used is not a false token. (*People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91 [138 P.2d 332] [valid check obtained by fraud not object of theft by false pretense].)

Implicit Misrepresentations

The misrepresentation does not have to be made in an express statement; it may be implied from behavior or other circumstances. (*People v. Mace* (1925) 71 Cal.App. 10, 21 [234 P. 841]; *People v. Randono* (1973) 32 Cal.App.3d 164, 174–175 [108 Cal.Rptr. 326] [analogizing to the law of implied contracts].)

Non-Performance of a Promise Is Insufficient to Prove a False Pretense

The pretense may be made about a past or present fact or about a promise to do something in the future. (*People v. Ashley* (1954) 42 Cal.2d 246, 259–265 [267 P.2d 271].) If the pretense relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of a promise. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469 [117 Cal.Rptr. 757].) The intent to defraud at the time the promise is made must be demonstrated. As the court in *Ashley* stated, "[w]hether the pretense is a false promise or a misrepresentation of fact, the defendant's intent must be proved in both instances by something more than mere proof of non-performance or actual falsity." (*People v. Ashley, supra,* 42 Cal.2d at p. 264 [court also stated that defendant is entitled to instruction on this point but did not characterize duty as sua sponte].)

See the Related Issues section under CALCRIM No. 1800, *Theft by Larceny*.

2100. Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a))

The defendant is charged [in Count _____] with causing injury to another person while (driving a vehicle/operating a vessel) under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] [in violation of Vehicle Code section 23153(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (drove a vehicle/operated a vessel);**
2. **When (he/she) (drove a vehicle/operated a vessel), the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug];**
3. **While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>*.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/operate a vessel) as an ordinarily cautious person,

in full possession of his or her faculties and using reasonable care, would (drive a vehicle/operate a vessel) under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

To decide whether the defendant committed _____ *<list name[s] of offense[s]>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/ _____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive/operate a vessel).]

New January 2006; Revised June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591

[35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v.*

Randolph (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125*, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(a); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined. Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined. Veh. Code, § 312.
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.

- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].
- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not

committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyaas, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2131. Refusal—Enhancement (Veh. Code, §§ 23577 & 23612)

If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then decide whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).

To prove this allegation, the People must prove that:

1. **A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);**
2. **The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;**

AND

3. **The defendant willfully refused to (submit to a test/ [or] to complete the test).**

To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:

1. **(He/She) may choose a blood(,/ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]**
2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**
3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**
4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of**

driving under the influence or with a blood alcohol level of 0.08 percent or more;

AND

5. Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.

<Short Alternative; see Bench Notes>

[(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

<Long Alternative; see Bench Notes>

[A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;

AND

B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions, suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of

alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.**]**

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the enhancement.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code,

§ 23612(a)(1)(C).) For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of "fully advised" **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of "ten years" for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the "seven year" time period.

The jury must determine whether the witness is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the witness was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the witness is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

AUTHORITY

- Enhancements. Veh. Code, §§ 23577 & 23612.
- Statute Constitutional. *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading. *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[4][a], [b] (Matthew Bender).

RELATED ISSUES

Admonition Must Convey Strong Likelihood of Suspension

It is insufficient for the officer to advise the defendant that his or her license "could" be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra,* 6 Cal.3d at p. 906; *Giomi, supra,* 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed

"[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra,* 107 Cal.App.3d at p. 363, the court set aside the defendant's license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant's own "obstreperous conduct . . . prevented the officer from completing the admonition," or where the defendant's own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

Defendant Incapable of Understanding Due to Injury or Illness

Where the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d 752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra,* 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension where defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. *(Ibid.)*

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

2240. Failure to Appear (Veh. Code, § 40508(a))

The defendant is charged [in Count _____] with failing to appear in court [in violation of Vehicle Code section 40508(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant received a citation;**
2. **In connection with that citation, the defendant (signed a written promise to appear (in court/[or] before a person authorized to receive a deposit of bail)/ [or] received a lawfully granted continuance of (his/her) promise to appear);**

AND

3. **The defendant willfully failed to appear (in court/[or] before a person authorized to receive a deposit of bail).**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[It does not matter whether the defendant was found guilty of the violation of the Vehicle Code alleged in the original citation.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Veh. Code, § 40508(a).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

4 Witkin, California Criminal Law (3d ed. 2000) Pretrial, § 50.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11,

Arrest, § 11.22[2], Ch. 12, *Bail*, § 12.04 (Matthew Bender).

2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)

The defendant is charged [in Count _____] with possession for sale of _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**
5. **The controlled substance was _____ <*insert type of controlled substance*>;**

AND

6. **The controlled substance was in a usable amount.**

***Selling* for the purpose of this instruction means exchanging _____ <*insert type of controlled substance*> for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the

right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- This Instruction Is Correct. *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance. *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base. *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872]).

2350. Sale, Furnishing, etc., of Marijuana (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with (selling/furnishing/administering/importing) marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/furnished/administered/imported into California) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

[AND]

4. **The controlled substance was marijuana(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant,

its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/ imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (sell/furnish/administer/import) it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not give element 5 or the bracketed definition of "usable amount." There is no case law on whether furnishing, administering, or importing require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 5 and the definition of usable amount are provided for the court to use at its discretion.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use

defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering. Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally. *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [g]–[i], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

2351. Offering to Sell, Furnish, etc., Marijuana (Health & Saf. Code, § 11360)

The defendant is charged [in Count _____] with offering to (sell/furnish/administer/import) marijuana, a controlled substance [in violation of Health and Safety Code section 11360].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant offered to (sell/furnish/administer/import into California) marijuana, a controlled substance;**

AND

2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/import) the controlled substance.**

[*Selling* for the purpose of this instruction means exchanging marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements. Health & Saf. Code, § 11360; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469-470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering. Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Compassionate Use Defense Generally. *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana. Health & Saf. Code, § 11359.

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

2352. Possession for Sale of Marijuana (Health & Saf. Code, §§ 11018, 11359)

The defendant is charged [in Count _____] with possessing for sale marijuana, a controlled substance [in violation of Health and Safety Code section 11359].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**
5. **The controlled substance was marijuana;**

AND

6. **The controlled substance was in a usable amount.**

Selling **for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which

specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements. Health & Saf. Code, § 11359.
- "Marijuana" defined. Health & Saf. Code, § 11018.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23

Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

- Compassionate Use Defense Generally. *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 68–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[e], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.

2360. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count _____] with (giving away/transporting) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (gave away/transported) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana was in a usable amount but not more than 28.5 grams in weight.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (give it away/transport it). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and

third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where a defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away 28.5 grams or less of marijuana. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57

Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [g], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. *(Ibid.)* "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel.*

Lungren v. Peron, supra, 59 Cal.App.4th at p. 1389).

2361. Transporting or Giving Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with (giving away/transporting) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (gave away/transported) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to

(give it away/transport it). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80] (Medical Marijuana Program applies

retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].

- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Transporting, Giving Away, etc., Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count _____] with (offering to give away/offering to transport/attempting to transport) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing 28.5 grams or less;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current

medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People*

v. Tilehkooh (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away 28.5 grams or less of marijuana. For transporting or giving away 28.5 grams or less of marijuana, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(b).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2363. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with (offering to give away/offering to transport/attempting to transport) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing more than 28.5 grams;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for

medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226]

[defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements. Health & Saf. Code, § 11360(a).
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation. *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Transport or Giving Away Not More Than 28.5 Grams of Marijuana. Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2370. Planting, etc., Marijuana (Health & Saf. Code, § 11358)

The defendant is charged [in Count _____] with [unlawfully] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana, a controlled substance [in violation of Health and Safety Code section 11358].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) one or more marijuana plants;**

AND

2. **The defendant knew that the substance (he/she) (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) was marijuana.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

<Defense: Compassionate Use>

[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then also give the bracketed word "unlawfully" in the first paragraph and element 1. If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, § 11358.

- Harvesting. *People v. Villa* (1983) 144 Cal.App.3d 386, 390 [192 Cal.Rptr. 674].
- Aider and Abettor Liability. *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 70, 111.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana. Health & Saf. Code, § 11357.

RELATED ISSUES

Aider and Abettor Liability of Landowner

In *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580], the court held that a landowner could be convicted of aiding and abetting cultivation of marijuana based on his or her knowledge of the activity and failure to prevent it. "If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property." *(Ibid.)*

2375. Simple Possession of Marijuana: Misdemeanor (Health & Saf. Code, § 11357(c))

The defendant is charged [in Count _____] with possessing more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11357(c)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>

[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441

[7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, § 11357(c); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Marijuana" Defined. Health & Saf. Code, § 11018.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [d], [3][a], [a.1] (Matthew Bender).

2376. Simple Possession of Marijuana on School Grounds: Misdemeanor (Health & Saf. Code, § 11357(d))

The defendant is charged [in Count _____] with possessing marijuana, a controlled substance, on the grounds of a school [in violation of Health and Safety Code section 11357(d)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **The controlled substance was marijuana;**
5. **The marijuana was in a usable amount but not more than 28.5 grams in weight;**
6. **The defendant was at least 18 years old;**

AND

7. **The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed

of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<Defense: Compassionate Use>

[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When instructing on the definition of "marijuana," the court may choose to

give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. *People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, § 11357(d); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Marijuana" Defined. Health & Saf. Code, § 11018.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

2377. Simple Possession of Concentrated Cannabis (Health & Saf. Code, § 11357(a))

The defendant is charged [in Count _____] with possessing concentrated cannabis, a controlled substance [in violation of Health and Safety Code section 11357(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed concentrated cannabis;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as concentrated cannabis;**

AND

4. **The concentrated cannabis was in a usable amount.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

***Concentrated cannabis* means the separated resin, whether crude or purified, from the cannabis plant.**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy concentrated cannabis does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>

[Possession of concentrated cannabis is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of concentrated cannabis was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or

approval. The amount of concentrated cannabis possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of concentrated cannabis was unlawful under the Compassionate Use Act, you must find the defendant not guilty.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana or concentrated cannabis.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Defenses—Instructional Duty

"Concentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (86 Cal. Op. Att'y Gen. 180, 194 (2003)) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements. Health & Saf. Code, § 11357(a); *People v. Palaschak* (1995)

9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].

- "Concentrated Cannabis" Defined. Health & Saf. Code, § 11006.5.
- Knowledge. *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana. Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use. *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821].
- Amount Must Be Reasonably Related to Patient's Medical Needs. *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

2514. Possession of Firearm by Person Prohibited by Statute: Self-Defense

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The defendant is not guilty of unlawful possession of a firearm[, as charged in Count _____,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/someone else/ _____ <*insert name of third party*>) was in imminent danger of suffering significant or substantial physical injury;**
2. **The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;**
3. **A firearm became available to the defendant without planning or preparation on (his/her) part;**
4. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;**
5. **No other means of avoiding the danger of injury was available;**

AND

6. **The defendant's use of the firearm was reasonable under the circumstances.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and

appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <*insert name of person who allegedly threatened defendant*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <*insert name of person who allegedly threatened defendant*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of person who was the alleged source of the threat*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent

with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

Related Instructions

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense. *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases. *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned. *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].

- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d] (Matthew Bender).

2542. Carrying Firearm: Active Participant in Criminal Street Gang (Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C))

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] _____], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**
2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**
   a. **Directly and actively committing a felony offense;**

      OR

   b. **aiding and abetting a felony offense.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**
2. **That has, as one or more of its primary activities, the commission of _____** *<insert one or more crimes listed*

in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>;

AND

3. **Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.**

In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

A *pattern of criminal gang activity*, as used here, means:

1. **[The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of)**

<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>

1A. (any combination of two or more of the following crimes/ [,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

[OR]

<Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

1B. [at least one of the following crimes:] _____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*

AND

[at least one of the following crimes:] _____ *<insert*

one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>;

2. **At least one of those crimes was committed after September 26, 1988;**

3. **The most recent crime occurred within three years of one of the earlier crimes;**

AND

4. **The crimes were committed on separate occasions or were personally committed by two or more persons.**

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

***Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]:** _____ *<insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted>*.

To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

To prove that the defendant aided and abetted felonious criminal

conduct by a member of the gang, the People must prove that:

1. **A member of the gang committed the crime**;
2. **The defendant knew that the gang member intended to commit the crime;**
3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

New January 2006; Revised August 2006, June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(3) or 12031(a)(2)(C) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra,* 26 Cal.4th 316, 323–324.)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged

crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "criminal street gang," "pattern of criminal gang activity," or "felonious criminal conduct."

Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

On request, give the bracketed paragraph that begins with "The People do not need to prove that the defendant devoted all or a substantial part of . . . ." (See Pen. Code, § 186.22(i).)

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua**

sponte duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1)(Felony) and § 186.22(d)(Felony or Misdemeanor))*.

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors. Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C).
- Elements of Gang Factor. Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements. *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Active Participation Defined. Pen. Code, § 186.22(i); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* §§ 144.01[1][d], 144.03[2] (Matthew Bender).

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

> [The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action. . . . ¶. . . [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(*Ibid*. [emphasis in original].)

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

2652. Resisting an Executive Officer in Performance of Duty (Pen. Code, § 69)

The defendant is charged [in Count _____] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] used force [or violence] to resist an executive officer;**
2. **When the defendant acted, the officer was performing (his/her) lawful duty;**

AND

3. **When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.**

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., peace officer, commissioner, etc.*> is an *executive officer*.]

[A sworn member of _____ <*insert name of agency that employs peace officer*>, authorized by _____ <*insert appropriate section from Pen. Code, § 830 et seq.*> to _____ <*describe statutory authority*>, is a *peace officer*.]

[The duties of (a/an) _____ <*insert title of officer specified in Pen. Code, § 830 et seq.*> include _____ <*insert job duties*>.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Penal Code section 148(a) may be a lesser included offense of this crime, see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 259 [68 Cal.Rptr.3d 508], which found that the trial court had a *sua sponte* duty to instruct on the lesser included offense defined by Penal Code section 148(a)(1), disagreeing

with *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

A person is *armed* with a deadly weapon when that person:

1. **Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged;**

AND

2. **Knows that he or she is carrying the deadly weapon [or has it available].**

<If there is an issue in the case over whether the defendant was armed with the weapon "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a

reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed portion that begins with "When deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of "armed," the court may give the bracketed phrase "or has a deadly weapon available" on request if the evidence shows that the weapon was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.3.
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin*

(1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].

- Armed. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Must Be Personally Armed. *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109-110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

RELATED ISSUES

Penal Code Section 220

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, "translates into an attempt to commit" a sexual offense. (*People v. Rich, supra,* 109 Cal.App.4th at p. 261.)

Multiple Weapons

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may

only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury's determination that pepper spray was a deadly weapon.

3131. Personally Armed With Firearm (Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a firearm in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]

A person is *armed* with a firearm when that person:

1. **Carries a firearm or has a firearm available for use in either offense or defense in connection with the crime[s] charged;**

AND

2. **Knows that he or she is carrying the firearm or has it available for use.**

<If there is an issue in the case over whether the defendant was armed with the firearm "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed during the commission of the offense and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

AUTHORITY

- Enhancement. Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b).
- Firearm Defined. Pen. Code, § 12001(b).
- Armed. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].

- Personally Armed. *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].
- Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3. *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- Defendant Not Present When Drugs and Weapon Found. *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391].
- Facilitative Nexus. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109-110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391], the defendant was convicted of possession of a controlled substance and an enhancement for being armed during that offense despite the fact that he was not present when the police located the illegal drugs and firearm. The Court held that there was sufficient evidence to support the arming enhancement, stating:

> [W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's

presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was "armed with a firearm in the commission" of a felony within the meaning of section 12022.

(*Ibid*.)

The *Bland* case did not state that the jury should be specifically instructed in these inferences, and it appears that no special instruction was given in *Bland*. If the prosecution requests a special instruction on this issue, the court may consider using the following language:

If the People have proved that a firearm was found close to the _____ <*insert type of controlled substance allegedly possessed*> in a place where the defendant was frequently present, you may but are not required to conclude that:

1. The defendant knew the firearm was present;
2. It was not accidental or coincidental that the firearm was present together with the drugs;

AND

3. During at least part of the time that the defendant allegedly possessed the illegal drug, (he/she) had the firearm close at hand and available for immediate use to aid in the drug offense.

If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm in the commission [or attempted commission] of the _____ <*insert name of alleged offense*>] [or the lesser crime of _____ <*insert name of alleged lesser offense*>].

Multiple Defendants—Single Weapon

Two or more defendants may be personally armed with a single weapon at the same time. (*People v. Smith* (1992) 9 Cal.App.4th 196, 205 [11 Cal.Rptr.2d 645].) It is for the jury to decide if the firearm was readily available to both defendants for use in offense or defense. *(Ibid.)*

For enhancements charged under Penal Code section 12022.3, see also the Related Issues section of CALCRIM No. 3130, *Personally Armed With Deadly Weapon*.

3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8)

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

[The People must also prove that _____ *<insert name of injured person>* **was not an accomplice to the crime.]**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* **was enough that it alone could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.

The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3

Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 12022.7, 12022.8.
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].

- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- This Instruction Is Correct In Defining Group Beating. *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986)

181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury that caused _____** *<insert name of injured person>* **to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of the crime;**

[AND]

2. **The defendant's acts caused _____** *<insert name of injured person>* **to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)**

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND

3. **_____** *<insert name of injured person>* **was not an accomplice to the crime.]**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[*Paralysis* is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert*

name of injured person> **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.

The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a

reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631

[3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].

- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3162. Great Bodily Injury: Age of Victim (Pen. Code, § 12022.7(c) & (d))

If you find the defendant guilty of the crime[s] charged in Count[s] _____[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of the crime;**

[AND]

2. **At that time, _____** *<insert name of injured person>* **was (under the age of 5 years/70 years of age or older)(./;)**

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND

3. **_____** *<insert name of injured person>* **was not an accomplice to the crime.]**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);

2. The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;

AND

[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.

The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a

reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v.*

Taylor (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, § 12022.7(c) & (d).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined. See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Domestic violence **means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).**

Abuse **means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4)

the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**
2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* **was enough that it alone could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

[OR]

[3B. The physical force that the defendant used on _____ *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause _____** *<insert name of injured person>* **to suffer great bodily injury.**

The defendant must have applied substantial force to _____ *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>

[The person who was injured does not have to be a person with whom the defendant had a relationship.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined. Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined. Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required. *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

RELATED ISSUES

Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse

Penal Code section 12022.7(e) does not require that the injury be inflicted on the "victim" of the domestic violence. (*People v. Truong* (2001) 90

Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where "an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair." (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3221. Aggravated White Collar Crime (Pen. Code, § 186.11(a)(1))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether the People have proved the additional allegation that the defendant engaged in a pattern of related felony conduct that (involved the taking of/ [or] resulted in the loss by another person or entity of) more than $_____ <*insert amount alleged*>.

To prove this allegation, the People must prove that:

1. **The defendant committed two or more related felonies, specifically _____ <*insert names of alleged felonies and descriptions if necessary*>;**
2. **Fraud or embezzlement was a material element of at least two related felonies committed by the defendant;**
3. **The related felonies involved a pattern of related felony conduct;**

AND

4. **The pattern of related felony conduct (involved the taking of/ [or] resulted in the loss by another person or entity of) more than $_____ <*insert amount alleged*>.**

A *pattern of related felony conduct* means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.

***Related felonies* are felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.**

[Fraud is a material element of _____ <*insert name of alleged felony*>.]

[Embezzlement is a material element of _____ <*insert name of alleged felony*>.]

The People have the burden of proving this allegation beyond a

reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the court has not otherwise instructed the jury on all the elements of the underlying felonies, the court must also give the appropriate instructions on those elements.

It is unclear if the court may instruct the jury that the fraud or embezzlement is a material element of the felonies. The bracketed sentences are provided for the court to use at its discretion.

AUTHORITY

- Enhancement. Pen. Code, § 186.11(a)(1).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 293.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.49 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[4][d], [f] (Matthew Bender).

3261. In Commission of Felony: Defined—Escape Rule

The People must prove that _____ <*insert allegation, e.g., the defendant personally used a firearm*> in the commission [or attempted commission] of _____ <*insert felony or felonies*>.

<*Give one or more bracketed paragraphs below depending on crime[s] alleged.*>

<*Robbery*>

[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety.

The perpetrator[s] (has/have) reached a temporary place of safety if:

- **(He/She/They) (has/have) successfully escaped from the scene; [and]**
- **(He/She/They) (is/are) no longer being chased(; [and]/.)**
- **[(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]**
- **[(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]**

<*Burglary*>

[The crime of burglary [or attempted burglary] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]

<*Sexual Assault*>

[The crime of _____ <*insert sexual assault alleged*> [or attempted _____ <*insert sexual assault alleged*>] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (is/are) no

longer in continuous physical control of the person who was the target of the crime].]

<Kidnapping>

[The crime of kidnapping [or attempted kidnapping] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being chased, and (is/are) no longer in continuous physical control of the person kidnapped.]

<Other Felony>

[The crime of _____ *<insert felony alleged>* **[or attempted** _____ *<insert felony alleged>***] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene and (is/are) no longer being chased.]**

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

Give this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act "during the commission or attempted commission" of the felony. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 208 [14 Cal.Rptr.3d 281, 91 P.3d 222].)

In *People v. Cavitt* (2004) 33 Cal.4th 187, *supra* at p. 208, the Court explained the "escape rule" and distinguished this rule from the "continuous-transaction" doctrine:

> [W]e first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The "escape rule" defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.] The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.] . . .

(*Ibid.* [italics in original].)

This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*. This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.

Similarly, this instruction should **not** be given if the issue is when the defendant formed the intent to aid and abet a robbery or a burglary. For robbery, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*. For burglary, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

AUTHORITY

- Escape Rule. *People v. Cavitt* (2004) 33 Cal.4th 187, 208–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Temporary Place of Safety. *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].
- Continuous Control of Victim. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857] [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [23 Cal.Rptr.2d 888] [robbery].
- Robbery. *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1170 [282 Cal.Rptr. 450, 811 P.2d 742].
- Burglary. *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314 [38 Cal.Rptr.2d 72].
- Lewd Acts on Child. *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [266 Cal.Rptr. 309, 785 P.2d 857].
- Sexual Assault. *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289].
- Kidnapping. *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [280 Cal.Rptr. 584]; *People v. Silva* (1988) 45 Cal.3d 604, 632 [247 Cal.Rptr. 573, 754 P.2d 1070].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[2][b][v], 142.10[1][b] (Matthew Bender).

RELATED ISSUES

Temporary Place of Safety Based on Objective Standard

Whether the defendant had reached a temporary place of safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [7 Cal.Rptr.2d 23].)

3406. Mistake of Fact

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <*insert crime[s]*>.

If you find that the defendant believed that _____ <*insert alleged mistaken facts*> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ <*insert crime[s]*>.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes).

New January 2006; Revised April 2008, December 2008

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing marijuana to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 288a(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(3).
- Burden of Proof. *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr. 745, 542 P.2d 1337].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73,

Defenses and Justifications, § 73.06 (Matthew Bender).

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

3453. Extension of Commitment (Pen. Code, § 1026.5(b)(1))

_____ <*insert name of respondent*> has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide _____ <*insert name of respondent*>'s mental condition at any other time or whether (he/she) is guilty of any crime.

To prove that _____ <*insert name of respondent*> currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:

1. **(He/She) suffers from a mental disease, defect, or disorder;**

AND

2. **As a result of (his/her) mental disease, defect, or disorder, (he/she) now:**

   a. **Poses a substantial danger of physical harm to others;**

AND

   b. **Has serious difficulty in controlling (his/her) dangerous behavior.**

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, _____ <*insert name of respondent*> must prove by a preponderance of the evidence that:

1. **(He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;**

AND

2. **(He/She) will continue to take that medicine in an unsupervised environment.**

Proof by *a preponderance of the evidence* is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more

likely than not that the fact is true.]

New January 2006; Revised June 2007, December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment, including the constitutional requirement that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*People v. Sudar* (2007) 158 Cal.App.4th 655, 663 [70 Cal.Rptr.3d 190].).

Give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*, as well as any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

The constitutional requirement for an involuntary civil commitment is that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*Kansas v. Crane* (2002) 534 U.S. 407, 412–413 [122 S.Ct. 867, 151 L.Ed.2d 856]; *In re Howard N.* (2005) 35 Cal.4th 117, 128 [24 Cal.Rptr.3d 866, 106 P.3d 305].) This requirement applies to an extension of a commitment after a finding of not guilty by reason of insanity. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159–1165 [54 Cal.Rptr.3d 873]; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878 [52 Cal.Rptr.3d 74]; *People v. Galindo* (2006) 142 Cal.App.4th 531 [48 Cal.Rptr.3d 241].)

AUTHORITY

- Instructional Requirements. Pen. Code, § 1026.5(b)(1).
- Unanimous Verdict, Burden of Proof. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Affirmative Defense of Medication. *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600–1602 [266 Cal.Rptr. 724].
- Serious Difficulty Controlling Behavior. *People v. Sudar* (2007) 158 Cal.App.4th 655, 662–663 [70 Cal.Rptr.3d 190] [applying the principles of *Kansas v. Crane* and *In re Howard N.*].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 693.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.10[7] (Matthew Bender).

RELATED ISSUES

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752.) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; see *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr. 2d 247].)

3456. Initial Commitment of Mentally Disordered Offender As Condition of Parole

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The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. **(He/She) was convicted of _____ <*specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)*> and received a prison sentence for a fixed period of time;**
2. **(He/She) had a severe mental disorder;**
3. **The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;**
4. **(He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;**
5. **The severe mental disorder either was not in remission, or could not be kept in remission without treatment;**

AND

6. **Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the**

severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[**A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on** _____ *<insert date of hearing, if desired>*, **the person:**

<Give one or more alternatives, as applicable>

[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ *<insert name of respondent>* **is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

New December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender*.

The court also **must give** CALCRIM Nos. 220, *Reasonable Doubt*; 222,

Evidence; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2966(b); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement. Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].
- Evidence of Later Improvement Not Relevant. Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678 [35 Cal.Rptr.2d 250].
- Board of Parole Hearings. Pen. Code, § 5075.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 639.

3457. Extension of Commitment as Mentally Disordered Offender

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The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Prison Terms]:

1. **(He/She) (has/had) a severe mental disorder;**
2. **The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;**

AND

3. **Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ <*insert the date the trial commenced*> the person:

<*Give one or more alternatives, as applicable*>

[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat

to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ <*insert name of respondent*> is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender as Condition of Parole*.

The court also **must give** CALCRIM Nos. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with "To prove this allegation" and use the past tense for an on-parole recommitment pursuant to Penal Code section 2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission,

would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder As That for Which the Offender Received Treatment. *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 640.

3458. Extension of Commitment to Division of Juvenile Facilities (Welf. & Inst. Code, § 1800)

The petition alleges that _____ <*insert name of respondent*> is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality that causes (him/her) to have serious difficulty controlling (his/her) dangerous behavior.

To prove this petition is true, the People must prove beyond a reasonable doubt that:

1. **(He/She) has a mental or physical deficiency, disorder, or abnormality;**
2. **The mental or physical deficiency, disorder, or abnormality causes (him/her) serious difficulty in controlling (his/her) dangerous behavior;**

AND

3. **Because of (his/her) mental or physical deficiency, disorder, or abnormality, (he/she) would be physically dangerous to the public if released from custody.**

You will receive [a] verdict form[s] on which to indicate your finding whether the petition is true or not true. To find the petition true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is physically dangerous to the public.

The court also **must give** CALCRIM Nos. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

AUTHORITY

- Elements and Definitions. Welf. & Inst. Code, §§ 1800 et seq.

- Unanimous Verdict, Burden of Proof. Welf. & Inst. Code, § 1801.5; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Serious Difficulty in Controlling Dangerous Behavior. *In re Lemanuel C.* (2007) 41 Cal.4th 33 [58 Cal.Rptr.3d 597, 158 P.3d 148]; *In re Howard N.* (2005) 35 Cal.4th 117 [24 Cal.Rptr.3d 866, 106 P.3d 305].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 966–967.

3471. Right to Self-Defense: Mutual Combat or Initial Aggressor

A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if:

1. (He/She) actually and in good faith tries to stop fighting;

[AND]

2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.)

<Give element 3 in cases of mutual combat>

[AND

3. (He/She) gives (his/her) opponent a chance to stop fighting.]

If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.

[A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.]

[If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

New January 2006; Revised April 2008, December 2008

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial

evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307].) In such cases, give the bracketed sentence that begins with "If you decide that."

If the defendant was the initial aggressor and is charged with homicide, always give CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, in conjunction with this instruction.

AUTHORITY

- Instructional Requirements. See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633 [39 P. 1073]; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749].
- Escalation to Deadly Force. *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307]; *People v. Anderson* (1922) 57 Cal.App. 721, 727 [208 P. 204].
- Definition of Mutual Combat. *People v. Ross* (2007) 155 Cal.App.4th 1033, 1045 [66 Cal.Rptr.3d 438].

Secondary Sources

1 Witkin & Epstein, Caifornia. Criminal Law (3d ed. 2000) Defenses, § 75.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[2][a] (Matthew Bender).